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8 CHURCHILL COUNTY AND
9 BENJAMIN TROTTER

7 UNITED STATES DISTRICT COURT
8 DISTRICT OF NEVADA

9 MICHAEL ERWINE,

10 Plaintiff,

11 vs.

12 CHURCHILL COUNTY, a political subdivision
13 of the State of Nevada; CHURCHILL COUNTY
14 SHERIFF BENJAMIN TROTTER; and DOES 1
15 through 10 inclusive,

16 Defendants.

CASE NO. 3:18-cv-00461-RCJ-CSD

DEFENDANTS' TRIAL BRIEF

17
18 COME NOW Defendants, CHURCHILL COUNTY and BENJAMIN TROTTER, by and
19 through their attorneys of record, Thorndal Armstrong Delk Balkenbush & Eisinger, and
20 pursuant to the Court's Amended Order Regarding Trial (Doc. No. 143) hereby submit their
21 Trial Brief.

22
23 I

24 **Introduction**

25 This is an employment case arising out of the alleged constructive discharge from
26 employment of Michael Erwine from the Churchill County Sheriff's Office on October 10, 2016.
27 Erwine filed his complaint on September 28, 2018, and an amended complaint on August 6,
28 2020. The amended complaint contains a claim premised upon 42 U.S.C. §1983 and the

1 Fourteenth Amendment of the United States Constitution and Article 1, §8(5) of the Nevada
2 Constitution based upon the alleged violation of a liberty interest without adequate process.
3 Erwine seeks damages against both Ben Trotter, former Sheriff of Churchill County, and
4 Churchill County under this particular liberty interest theory of relief. Mr. Trotter is sued
5 individually for his participation in the alleged constitutional violation and Churchill County is
6 sued on the basis of Mr. Trotter's position as a policy-making official for Churchill County at the
7 time of the alleged violation. Erwine also seeks damages under several state tort claims,
8 including defamation, intentional interference with prospective employment opportunities, and
9 tortious discharge.
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11 II

12 Underlying Facts

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14 Erwine worked as a deputy sheriff at the Churchill County Sheriff's Office from
15 December 9, 2015, until October 10, 2016, when he resigned in lieu of termination. Erwine was
16 a probationary employee at the time of his separation from employment with Churchill County.
17 Following Erwine's separation from employment, Trotter prepared a memorandum dated
18 October 10, 2016, concerning the reasons for his decision to terminate Erwine's employment
19 during his probationary period. The memorandum was placed in Erwine's personnel file but was
20 not shown to Erwine. Erwine claims that the statements in the memorandum are false and
21 defamatory. Mr. Trotter and the County deny Erwine's allegations in this regard. In December
22 of 2016, Churchill County received a request from the Washoe County Sheriff's Office for a
23 copy of Erwine's personnel file, accompanied by an authorization for release of the information
24 to WCSO signed by Erwine. Churchill County complied with the request.
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27 Following his separation from employment with Churchill County, Erwine worked as a
28 security guard for Allied Universal from April 25, 2017, to January 18, 2018. Thereafter, from

1 January 8, 2018, through April 4, 2018, Erwine worked as a police officer with the Pyramid Lake
2 Paiute Tribe. Erwine was terminated by the Pyramid Lake Paiute Tribe for failure to have
3 passed his probationary period. Erwine was again employed as a security officer with a
4 company called Triumph Protection Group from June 28, 2018, through October 27, 2019. In
5 November of 2019, Erwine began working as a police officer with the Washoe Tribe of Nevada
6 and California. At the time of his deposition on December 17, 2020, Erwine had completed his
7 one year probationary period with the Washoe Tribe and was earning \$25.85 per hour plus
8 medical benefits. During his deposition, Erwine admitted that his position with the Washoe
9 Tribe is in the field (law enforcement) in which he desires to be employed. *See*, Exhibit 1,
10 deposition of Michael Erwine, p. 23. Erwine also testified that, in his position as a police officer
11 with the Washoe Tribe, his job duties include, “everything you can imagine a general law
12 enforcement officer handles.” *Id.* at 18. Although Erwine did not pass his probationary period
13 with the Pyramid Lake Paiute Tribe, Erwine testified that his duties with that agency included the
14 same duties he has currently with the Washoe Tribe. *Id.* at 42. He further testified that, with the
15 Pyramid Lake Paiute Tribe, his job duties included, “everything from minor traffic enforcement
16 to in-depth investigations of crimes.” *Id.* at 42-43.

20 Erwine was convicted of driving under the influence in June of 2011. Prior to being
21 hired by the Churchill County Sheriff’s Office, Erwine applied for, and was rejected from, law
22 enforcement positions with the Washoe County Sheriff’s Office, the Sparks Police Department,
23 the Lyon County Sheriff’s Office, the Fallon Tribal Police, and the Washoe Tribal Police.

25 On March 11, 2021, current Churchill County Sheriff Richard Hickox offered Erwine a
26 position as a deputy sheriff with Churchill County. *See*, Exhibit 2, Offer of Employment. In
27 connection with this offer of employment, Erwine was advised that his employment would not
28 be subject to completion of a 12 month probationary period and that his starting wage would be

1 \$27.30 (representing the current hourly wage for patrol deputies with like experience at the
 2 Churchill County Sheriff's Office). *Id.* The offer included additional terms concerning
 3 restoration of Erwine's sick leave and vacation time. Sheriff Hickox also advised Erwine that
 4 the Sheriff's Office was willing to work with him on a mutually agreeable time frame for him to
 5 meet the additional requirement of residing within a 25 minute response to time to the Sheriff's
 6 Office. Erwine rejected the County's offer of employment.¹ This offer was not contingent upon
 7 Erwine dismissing or compromising any of his claims in the instant matter and is and was not a
 8 communication made for purposes of settlement negotiations.

10 As this case goes to trial, Erwine remains employed as a law enforcement officer with the
 11 Washoe Tribe.

13 III

14 Legal Issues

15 I. Erwine's Liberty Interest Claim Premised Upon the Fourteenth Amendment of the 16 United States Constitution and Article 1, Section 8(5) of the Nevada Constitution 17 will be Subject to a Motion for Directed Verdict.

18 Erwine's §1983 claim, whether pled against Trotter individually or Churchill County
 19 under a *Monell* theory, is one for violation of an alleged liberty interest protected by the
 20 Fourteenth Amendment. Erwine was a probationary employee at the time of his resignation
 21 from employment with the County and had no protected property interest in continued
 22 employment. As a result, Erwine's only avenue for recovery is under the very specific "stigma
 23 plus" test carved out by the Courts in particular circumstances. As fully articulated by the Court
 24 in its order denying Erwine's motion for summary judgment on the federal claim, in order to
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 28 ¹A review of Erwine's Amended Complaint reveals that he had problems with then Sergeant
 Shawn Summers and former Sheriff Ben Trotter. Neither Summers nor Trotter are currently
 associated with the Churchill County Sheriff's Office and, as discussed above, Richard Hickox is
 now the commanding officer of same.

1 make out a prima facie case under this legal theory, Erwine must show that the Defendants
2 deprived him of a protected liberty interest without adequate process. In the public employment
3 context, Erwine must show that he was terminated from his employment in conjunction with a
4 stigmatizing statement. *Board of Regents v. Roth*, 408 U.S. 564, 573 (1972). Erwine must prove
5 both of these elements and, in addition, must show that the statement was false and, to be
6 sufficiently stigmatizing, that it impaired his reputation for honesty or morality. *Tibbetts v.*
7 *Kulongoski*, 567 F.3d 529, 535-36 (9th Cir. 2009); *see also, Brady v. Gebbie*, 859 F.2d 1543,
8 1552 (9th Cir. 1988).

10 Further, the statements must be so severe as to, “effectively exclude the employee
11 completely from [his] chosen profession.” *Blantz v. California Dep’t of Corr. & Rehab., Div. of*
12 *Corr. Health Care Servs.*, 727 F.3d 917, 925 (9th Cir. 2013). As also pointed out by this Court,
13 stigmatizing statements that merely cause, “reduced economic returns and diminished prestige,
14 but not permanent exclusion from, or protracted interruption of, gainful employment within the
15 trade or profession,” do not constitute a deprivation of liberty.” *Id.* The Ninth Circuit Court of
16 Appeals has, “consistently held that people do not have liberty interests in a specific employer.”
17 *Llamas v. Butte Cmty. Coll. Dist.*, 238 F.3d 1123, 1128 (9th Cir. 2001). Rather, the due process
18 clause protects a generalized right to choose one’s field of private employment. *Id.* at 1128
19 (quoting *Conn v. Gabbert*, 526 U.S. 286, 292 (1999)).

22 Without conceding that Erwine was terminated from Churchill County’s employ in
23 connection with false, stigmatizing statements, the evidence at trial will be uncontroverted that
24 Erwine obtained employment as a law enforcement officer with the Pyramid Lake Paiute Tribe
25 on January 8, 2018, and, in fact, the parties have so stipulated for purposes of trial. Erwine was
26 terminated from the Pyramid Lake Paiute Tribe during his probationary period effective April 4,
27 2018. Thereafter, in November of 2019, Erwine began working as a law enforcement officer for
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1 the Washoe Tribe of Nevada and California, a law enforcement agency for which Erwine
2 continues to work at the present time. Erwine testified during his deposition that, in both of
3 these positions, he performed all of the duties of a law enforcement officer. In terms of his
4 current position, Erwine testified that his job duties include, “[e]verything you can imagine a
5 general law enforcement officer handles.” *See*, Exhibit 1, p. 18. Erwine further testified that,
6 while not the “most desirable position” to him, his job with the Washoe Tribe “is a job in the
7 field that I wish to work in.” *Id.* at 23. Erwine testified during his deposition that he could not
8 recall when he applied for a law enforcement position with the Paiute Tribe. However, he
9 estimated it was six to eight months prior to his hire date of January 8, 2018. *Id.* at 31-32.
10 According to Erwine’s testimony, the hiring process in the law enforcement field generally takes
11 that amount of time to be completed. *Id.* at 32. Erwine did not sustain a protracted interruption
12 of employment in law enforcement as a result of any actions of Churchill County. Rather,
13 according to Erwine’s own testimony, the hiring process in the field of law enforcement is fairly
14 lengthy as a rule.

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18 These admissions are fatal to Erwine’s §1983 claim against Trotter, as well as his §1983
19 claim against Churchill County premised upon the actions of Trotter as a final policy-making
20 official. The Defendants expect to move for judgment in their favor as a matter of law upon
21 conclusion of Erwine’s case-in-chief on Erwine’s §1983 claim.²

22
23 It is apparent that Erwine intends to argue at trial, and to the Court, that he is entitled to
24 judgment in his favor of his §1983 claim because the memorandum of October 10, 2016, was
25 placed in Erwine’s file in violation of NRS 289.040. Erwine clearly believes that certain
26 admissions by the Defendants concerning treatment of the memorandum as related to several
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28 ²Should the Court grant judgment in the Defendants’ favor under FRCP 50 of the federal claims
for relief, the Defendants will move for dismissal of the state law claims on jurisdictional
grounds so that those claims may be tried in Churchill County in accordance with NRS 13.020.

1 sections of Chapter 289 *compel* judgment in his favor. In other words, Erwine intends to argue
2 that a violation of Chapter 289 equates to a violation of his due process rights under the
3 Fourteenth Amendment. This is not the law.

4 While Chapter 289 does set forth procedural requirements applicable to law enforcement
5 officers, these procedural requirements are not ends in themselves protected by the due process
6 clause. *See, Olim v. Wakinekona*, 461 U.S. 238, 251 (1983). In enacting Chapter 289, the
7 legislature provided for a specific remedy available to law enforcement officers aggrieved by an
8 action of an employer for a violation of same. NRS 289.120 provides that, after exhausting any
9 applicable internal or collectively bargained-for grievance procedures, an officer who believes
10 his rights under Chapter 289 are violated may apply to the district court for judicial relief. This
11 remedy also empowers the district court with authority to order appropriate injunctive or other
12 extraordinary relief (such as, for example, a name-clearing hearing) to prevent further violation
13 of Chapter 289's provision or any retaliatory conduct by the employer on account of an
14 employee's actions in exercising his rights under same. *See*, NRS 289.120.

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17 Erwine elected *not* to pursue such a remedy and, instead filed a due process claim in this
18 Court under §1983. Erwine had no protected property interest in his job with Churchill County.
19 As such, Erwine is limited to pursuing his due process claim as a liberty interest violation.
20 Erwine cannot make out a prima facie liberty interest claim here based upon (among other
21 things) the uncontroverted evidence the Erwine has not been effectively excluded completely
22 from his career as a law enforcement officer.
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25 The due process clause set forth at Article I, §8(5) of the Nevada Constitution is identical
26 to that set forth in the United States Constitution and it must be analyzed at trial in the same
27 manner as is Erwine's §1983 claim premised upon the Fourteenth Amendment. *See, Rodriguez*
28 *v. Dist. Ct.*, 120 Nev. 798, 102 P.3d 41, 48, n. 22 (2004).

1 Nothing in the language of the statute suggests that the Nevada legislature intended to
2 create due process rights greater than those protected by the Fourteenth Amendment in enacting
3 the relevant provisions of Chapter 289 and the Nevada Supreme Court has never so held.
4 Having elected not to proceed with an action authorized by NRS 289.120, Erwine must prove
5 those elements required of a stigma-plus type liberty interest claim whether analyzed under the
6 United States Constitution or Article 1, §8(5) of the Nevada Constitution. The uncontroverted
7 evidence demonstrates that he cannot make out a prima facie case on this legal theory.
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9 Erwine's §1983 claim against Churchill County is premised solely upon the fact that
10 Trotter was a final policy-making official for Churchill County at the time of the events in
11 question. As such, it is indistinguishable from a legal analysis standpoint from his claim against
12 Trotter individually.
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14 **II. Erwine's State Tort Claims**

15 **A. Defamation**

16 In order to establish his claim for defamation, Erwine must demonstrate that Trotter made
17 a false and defamatory statement of fact, that there was an unprivileged publication of the
18 statement to a third person, that Trotter made the statement with knowledge of its falsity or
19 reckless disregard for its truth, and that he sustained actual damages as a result. As a police
20 officer, Erwine is considered a public figure. *See, Posadas v. City of Reno*, 109 Nev. 448, 851
21 P.2d 438, 442 (1993). As such, he must prove that Trotter entertained serious doubts as to the
22 truth of the statements in the memorandum or had a high degree of awareness of the statements'
23 probable falsity. Here, the Defendants will prove at trial that the statements in the October 10,
24 2016, memorandum are substantially true and that Trotter was not reckless with respect to same.
25 Further, the statements set forth in the memorandum were made as required by NRS 239B.020
26 which mandates the provision of information to public safety agencies thereby implicating
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1 privilege issues. Defendants will also demonstrate at trial that Erwine did not suffer actual
2 damages as caused by the October 10, 2016, memorandum.

3 **B. Tortious Constructive Discharge**

4 In order to establish his claim for tortious constructive discharge, Erwine must
5 demonstrate that his resignation was induced by an action and conditions that violate public
6 policy. Erwine premises this claim on the notion that he was terminated because he reported
7 improper conduct of other officers to Trotter. The evidence which will be established at trial will
8 not support Erwine's claim in this regard. Rather, the evidence will demonstrate that the
9 decision made by Trotter with respect to Erwine's employment with the Churchill County
10 Sheriff's Office was based on Erwine's job performance. Despite the manner in which Erwine
11 attempts to frame the circumstances surrounding his separation from employment with the
12 County, Erwine did, in fact, fail to report what he perceived as mistreatment of inmate Beaulieu
13 to superior officers and began conducting his own investigation into the conduct of other
14 employees of the Sheriff's Office. Similarly, while Erwine has an opinion as to why his actions
15 in unholstering his taser during the Maes' incident was proper, it will be undisputed at trial that
16 he did engage in such action with respect to a trustee inmate who was kneeling on the ground
17 and posed no safety threat at the time. The evidence at trial will not demonstrate that Erwine
18 was subjected to aggravated and intolerable conditions which would have led a reasonable
19 person to resign or that Trotter had knowledge, either actual or constructive, of any intolerable
20 conditions. As a probationary employee, Erwine was subject to dismissal without cause. He was
21 given the option to resign. He took that option. The evidence to be presented at trial will not
22 support that Erwine was terminated in violation of public policy of the State of Nevada.

23 ///

1 **C. Interference with Prospective Economic Advantage**

2 In order to prove a claim of interference with prospective economic advantage, Erwine
3 must show the existence of a prospective contractual relationship between Erwine and a third
4 party of which the Defendants were aware, that the Defendants intended to harm Erwine by
5 preventing the relationship, the absence of privilege and actual harm. Churchill County provided
6 the October 10, 2016, memorandum to the Washoe County Sheriff's Office pursuant to that
7 agency's request as required by NRS 239B.020. There will be no evidence at trial that Trotter
8 intended to harm Erwine with respect to the memorandum or that Erwine suffered actual harm as
9 a direct result of the memorandum.
10

11 **III. Damages**

12 **A. State Tort Claims**

13 Before turning to Erwine's claimed damages generally, any damages awarded to Erwine
14 by the jury under his state tort claims, including his claim premised upon the due process clause
15 set forth in the Nevada Constitution, are subject to the statutory cap on damages set forth at NRS
16 41.035. Under the state law tort cap, Erwine cannot recover more than \$100,000.00 total under
17 his state law claims and punitive damages are prohibited. As such, if the jury awards Erwine
18 damages under any state law claim, the Defendants will request that they be reduced by the
19 Court in accordance with NRS 41.035.
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22 **B. Damages**

23 There is no evidence in this case to support inclusion of back pay or front pay on any jury
24 instruction or verdict form in this case. Erwine has based his economic damage claim entirely on
25 the proposed testimony of Gilbert Coleman. The Defendants have moved to exclude Coleman's
26 testimony based upon the utter lack of foundation for same. More specifically, Coleman's
27 opinion is focused solely on the Las Vegas Metropolitan Police Department and his opinion that
28

1 Erwine sustained between \$912,567.00 and \$6,144,811.00 in lost wages as a result of not being
2 hired by that agency. In rendering this opinion, Coleman makes unfounded assumptions that
3 Erwine would have been employed by LVMPD for 10, 15 and/or his entire work life expectancy
4 but for the actions of the Defendants and that he would have been promoted up the ranks to
5 sergeant and lieutenant. An expert's testimony regarding future lost earnings must be
6 accompanied by a sufficient factual foundation before it can be submitted to the jury. *See,*
7 *Gumbs v. International Harvester, Inc.*, 718 F.2d 88, 98 (3rd Cir. 1983). Here, there is no
8 foundation whatsoever for this opinion and it is not helpful given that the Ninth Circuit has
9 clearly held that a plaintiff does not have a liberty interest in a specific employer. *See, Llamas v.*
10 *Butte Cmty. Coll. Dist.*, 238 F.3d 1123, 1128 (9th Cir. 2001).

13 When asked during discovery to provide all facts upon which he bases his claim for lost
14 earnings, including the amount he claims to have lost in salary, compensation and/or income,
15 Erwine responded in answers to written interrogatories as follows: "Objection. The question
16 calls for a professional opinion from a lay witness; consequently the question is oppressive,
17 harassing, and without a foundational showing of competency. I am seeking the amounts of
18 compensation as disclosed in the Expert Report of Gilbert Coleman, Ph.D." *See*, Exhibit 3,
19 Plaintiff's answer to Defendants' Interrogatory No. 8. At no time during discovery did Erwine
20 supplement his responses to Defendants' interrogatories. Should the Court exclude Coleman's
21 testimony on Defendants' motion in limine (denied by the Court without prejudice on February
22 7, 2022), Erwine cannot be permitted to ask for economic damages in the form of lost wages.

25 In the event Erwine is permitted to seek damages for lost wages, he should be precluded
26 from asking for front pay beyond, at the very latest, November of 2019, when he gained
27 employment as a law enforcement officer with the Washoe Tribe of Nevada and California.
28 Further, it is uncontroverted that Churchill County offered to reinstate Erwine on March 11,

1 2021, and he should not be permitted to ask for damages in the form of front pay beyond that
2 date.

3 DATED this 10th day of February, 2022.

4 THORNDAL ARMSTRONG
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13 Attorneys for Defendants

14 Churchill County and

15 Benjamin Trotter

CERTIFICATE OF SERVICE

Pursuant to FRCP 5(b), I certify that I am an employee of THORNDAL ARMSTRONG DELK BALKENBUSH & EISINGER, and that on this date I caused the foregoing **DEFENDANTS' TRIAL BRIEF** to be served on all parties to this action by:

_____ placing an original or true copy thereof in a sealed, postage prepaid, envelope in the

United States mail at Reno, Nevada.

☒ United States District Court, District of Nevada CM/ ECF (Electronic Case Filing)

_____ personal delivery

_____ facsimile (fax)

_____ Federal Express/UPS or other overnight delivery

fully addressed as follows:

Luke Busby, Esq.
316 California Ave., #82
Reno, NV 89509
Attorney for Plaintiff

DATED this 10 day of February, 2022.



An employee of THORNDAL ARMSTRONG
DELK BALKENBUSH & EISINGER